CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 157

COMMONWEALTH OF MASSACHUSETTS, et al
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONS FOR CERTIORARI FILED JUNE 27, 1947.

CERTIORARI GRANTED OCTOBER 13, 1947.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1945.

No. 4193.

COMMONWEALTH OF MASSACHUSETTS ET AL.,

APPELLANTS,

v.

UNITED STATES OF AMERICA,

PLAINTIFF, APPELLEE.

No. 4209.

UNITED STATES OF AMERICA,

PLAINTIFF, APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS ET AL.,

APPELLEES.

CROSS APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, FROM JUDGMENT (WYZANSKI, J.), MAY 24, 1946.

TRANSCRIPT OF RECORD.

EDMUND J. BRANDON, UNITED STATES ATTORNEY,
GEORGE F. GARRITY, ASSISTANT U. S. ATTORNEY,
for UNITED STATES OF AMERICA.

CLARENCE A. BARNES, ATTORNEY GENERAL, MASS.,
ALFRED E. LoPRESTI, ASSISTANT ATTORNEY GENERAL,
JOHN A. BRENNAN,
for COMMONWEALTH OF MASSACHUSETTS ET AL.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1945.

No. 4193.

COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLANTS,
v.
UNITED STATES OF AMERICA,
PLAINTIFF, APPELLEE.

No. 4209.

UNITED STATES OF AMERICA,
PLAINTIFF, APPELLANT,
v.
COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLEES.

TRANSCRIPT OF RECORD OF THE DISTRICT COURT.

No. 3671, CIVIL ACTION.

UNITED STATES OF AMERICA,
Plaintiff,
v.
CARLTON W. SPENCER ET INTERVENER,
Defendants.

APPEAL OF DEFENDANT, CARLTON W. SPENCER AND OF INTERVENER COMMONWEALTH OF MASSACHUSETTS, AND OF PLAINTIFF UNITED STATES OF AMERICA FROM JUDGMENT ENTERED MAY 24, 1946.

The Complaint in this cause was filed on April 30, 1945; was duly entered at the March Term, 1945, of this court and is as follows:

COMPLAINT.

[Filed April 30, 1945.]

The plaintiff, by Edmund J. Brandon, United States Attorney, and Thomas P. O'Connor, Assistant United States Attorney, brings this complaint and avers as follows:

I. This is an action of a civil nature, arising under the laws providing for internal revenue, to establish and enforce the personal liability of the defendant for a debt due the plaintiff for taxes, as hereinafter set forth. The action is commenced under the authority and sanction of the Commissioner of Internal Revenue and under the direction of the Attorney General of the United States.

II. The defendant, who resides within the District of Massachusetts, was, at the time of the acts herein complained of, assignee under a voluntary assignment for the benefit of creditors by Somerville Sales & Service, Inc., a corporation organized, and now or formerly existing, under the laws of the Commonwealth of Massachusetts, with a principal place of business within said District, and having been, at the time of the acts herein complained of, a debtor corporation not having sufficient property to pay all its debts.

III. The Commissioner of Internal Revenue assessed taxes against the corporation, the liability for which was incurred within the District of Massachusetts, as follows:

Type of Tax	Period	Tax		
(1) Federal Insurance Contributions Act (Title VIII)	1st Quarter 1938	Tax	$179.49	
		Penalty	26.92	
		Interest	2.69	
				$209.10
(2) "	2nd Quarter 1938	Tax		196.87
(3) "	3rd Quarter 1938	Tax	$122.51	
		Penalty	18.38	
		Interest	2.65	
				143.54
(4) "	4th Quarter 1938	Tax	$112.91	
		Penalty	5.65	
		Interest	1.32	
				119.88
(5) "	1st Quarter 1939	Tax		20.66
(6) Federal Unemployment Tax Act (Title IX)	1938	Tax	$917.22	
		Penalty	45.86	
				963.08
(7) Capital Stock	1939	Tax		21.00
		Grand Total		$1,674.13
		Paid		331.39*
		Balance Due		$1,342.74

*(This amount was applied to Federal Insurance Contributions taxes.)

IV. On some date, unknown to the plaintiff, subsequent to the date the tax liability was incurred and prior to March 29, 1939,

the corporation made a voluntary assignment for the benefit of creditors to the defendant, who thereafter came into possession of certain assets of the corporation which he converted into cash in the total amount, including also cash acquired from the corporation, of $1,135.11.

V. Proofs of claim, original and amended, were filed by the Collector of Internal Revenue with the defendant, as assignee, on March 29, 1939, May 13, 1939, June 12, 1939, and May 8, 1940, this last proof of claim being in the amount of $1,801.46.

VI. On or about October 6, 1939, all of the above-mentioned cash was disbursed by the defendant as follows: $803.72 was paid to the Massachusetts Division of Unemployment Compensation and the balance of $331.39 was paid to the Collector of Internal Revenue, leaving a balance of $1,342.74 due the plaintiff for taxes, including interest figured to on or about the respective dates of assessments.

VII. Section 3466 of the Revised Statutes (U.S.C. 1940 ed., Title 31, Section 191) provides that in cases of this kind debts due the United States shall be first satisfied. Section 3467, as amended by Section 518 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680 (U.S.C. 1940 ed., Title 31, Sec. 192), provides that if certain named fiduciaries, including assignees, pay other debts before satisfying claims of the United States, such fiduciaries shall be personally liable, to the extent of such payments, for the debts so due the United States. The defendant is, therefore, personally liable to the plaintiff in the amount of $803.72, the same being the amount of the payment by him on a debt other than the debt to the plaintiff.

Wherefore, the plaintiff demands judgment against the defendant for the said sum of $803.72, interest, and costs.

EDMUND J. BRANDON,
United States Attorney,
Attorney for Plaintiff.

THOMAS P. O'CONNOR,
Assistant United States Attorney.
11th Floor, Federal Building, Boston, Massachusetts.

[MEMORANDUM: The following Motion to Amend the Complaint was introduced and allowed at the trial:]

PLAINTIFF'S MOTION TO AMEND COMPLAINT.

The plaintiff moves to amend the complaint, heretofore filed, by striking out paragraph III thereof and by substituting therefor the following:

Type of Tax	Period			
(1) Social Security Act (Title VIII)	1st Quarter 1938	Tax	$179.49	
		Penalty	26.92	
		Interest	2.69	
				$209.10
(2) "	2nd Quarter 1938	Tax		196.87
(3) "	3rd Quarter 1938	Tax	$122.51	
		Penalty	18.38	
		Interest	2.65	
				143.54
(4) "	4th Quarter 1938	Tax	$112.91	
		Penalty	5.65	
		Interest	1.32	
				119.88
(5) "	1st Quarter 1939	Tax		20.66
(6) Social Security Act (Title IX)	1938	Tax	$917.22	
		Penalty	45.86	
				963.08
(7) Capital Stock	1939	Tax		21.00
		Grand Total	.....	$1,674.13
		Paid	.....	331.39*
		Balance Due	.....	$1,342.74

*(This amount was applied to the Social Security Act taxes under Title VIII.)

EDMUND J. BRANDON,
United States Attorney,
Attorney for Plaintiff.

GEORGE F. GARRITY,
Assistant United States Attorney.

Assented to:

FRANK C. HESSION,
Counsel for the Defendant.

JOHN A. BRENNAN,
Counsel for the Intervener.

Allowed 4/3/46.
CHARLES E. WYZANSKI, JR.,
U.S.D.J.

During the same term, on May 16, 1945, the following Answer was filed:

ANSWER OF DEFENDANT.

[Filed May 16, 1945.]

1. The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 1 of the complaint.

2. The defendant admits the allegations of paragraph 2 of the complaint.

3. The defendant admits the allegations of paragraph 3 of the complaint.

4. The defendant admits that subsequent to the date of the tax liability referred to in paragraph 3 of the complaint and prior to March 29, 1939, Somerville Sales and Service, Inc., made a voluntary assignment for the benefit of creditors to the defendant. The defendant admits the other allegations in paragraph 4.

5. The defendant admits the allegations of paragraph 5.

6. The defendant admits that on October 6, 1939, $803.72 was paid to the Massachusetts Division of Unemployment Compensation, and $331.39 was paid to the Collector of Internal Revenue. The defendant denies the other allegations of paragraph 6.

7. The defendant denies the allegations of paragraph 7.

8. And further answering, the defendant says that the payments made by the defendant, set forth in paragraph 6 of the complaint, were made pursuant to an agreement made by the plaintiff, the Massachusetts Division of Unemployment Compensation and the defendant, and that said payment in the sum of $803.72, made October 6, 1939, to the Massachusetts Division of Unemployment Compensation, was made with the full knowledge and approval of the plaintiff upon agreement on the part of said Massachusetts Di-

vision of Unemployment Compensation to pay said sum to the plaintiff if it should be determined as matter of law that said payment should have been made to the plaintiff. The defendant says that the plaintiff is estopped in equity and good conscience from prosecuting any claim against him.

Wherefore, the defendant prays that the complaint be dismissed and for his costs.

By his attorney,

FRANK C. HESSION.
30 State Street, Boston, Mass.

CERTIFICATE OF SERVICE.

I, Frank C. Hession, attorney for the defendant, hereby certify that I have served a copy of the foregoing answer upon Edmund J. Brandon, Esquire, United States Attorney, counsel of record for the plaintiff, by mailing a letter, postage prepaid, containing a copy of the above answer to Edmund J. Brandon, Esquire, Federal Building, Boston, Massachusetts, May 15, 1945.

FRANK C. HESSION.

During the same term, on June 14, 1945, the following Motion to Intervene was filed:

MOTION TO INTERVENE.

[Filed June 14, 1945.]

The Commonwealth of Massachusetts, Division of Employment Security, moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in its proposed answer, of which a copy is hereto attached, on the ground that the United States government and the Commonwealth of Massachusetts are in a Federal-State plan to relieve unemployment, and the payment of $803.72 made by the defendant, Carlton W. Spencer, was a proper payment to the Commonwealth of Massachusetts both in fact and in law by virtue of the provisions of Sec. 902 (a) (1) of the Social Security Act as amended by H. R. 6635, 76th Congress, 1st Session, and as such has a defense to plaintiff's claim

presenting both questions of law and of fact which are common to the main action, and the representation of the applicant's interest by the existing parties is inadequate and the applicant may be bound by a judgment in the action.

JOSEPH J. LEONARD,
Designee of Attorney General,
JOHN A. BRENNAN,
Designee of Attorney General,
Attorneys for the Commonwealth of Massachusetts, Division of Employment Security, Applicant for Intervention.
881 Commonwealth Avenue, Boston, Massachusetts.

June 25, 1945, SWEENEY, J.

Hearing. Motion allowed, no one appearing to oppose, Mr. Garrity, Assistant United States Attorney, not objecting thereto.

By the Court,

JOSEPH J. DUWAN,
Deputy Clerk.

NOTICE OF MOTION.

To: EDMUND J. BRANDON, United States Attorney, Department of Justice,
Post Office Building, Boston Massachusetts:

CARLTON W. SPENCER,
30 State Street, Boston, Massachusetts:

Please take notice that the undersigned will bring this motion before this court at Room 6, Post Office Building, in the City of Boston, on the twenty-fifth day of June 1945, at 2 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard.

JOSEPH J. LEONARD,
Designee of Attorney General,

JOHN A. BRENNAN,
Designee of Attorney General, Attorneys for the Commonwealth of Massachusetts, Division of Employment Security, Applicant for Intervention.

During the same term, on June 25, 1945, the above cause came on for hearing upon the motion to intervene, the Honorable George C. Sweeney, United States District Judge sitting, and after full hearing was allowed as appears endorsed thereon.

On the same day after the motion to intervene had been allowed the intervener filed the following Answer:

INTERVENER'S ANSWER.
[Filed June 25, 1945.]

1. The intervener is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph I of the complaint.

2. The intervener admits that the defendant, Carlton W. Spencer, who resides within the District of Massachusetts, was, at the time of the acts herein complained of, assignee under a voluntary assignment for the benefit of creditors by Somerville Sales & Service, Inc., a corporation organized, and now or formerly existing, under the laws of the Commonwealth of Massachusetts, with a principal place of business within said District. The intervener is without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph II.

3. The intervener is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph III of the complaint.

4. The intervener admits, that on some date subsequent to the date the tax liability was incurred and prior to March 29, 1939, the corporation made a voluntary assignment for the benefit of creditors to the defendant, Carlton W. Spencer. The intervener is without knowledge or information sufficient to form a belief as

to the truth of the other averments of paragraph IV of the complaint.

5. The intervener is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph V of the complaint.

6. The intervener admits that on October 6, 1939, $803.72 was paid to the Massachusetts Division of Unemployment Compensation (now the Massachusetts Division of Employment Security). The intervener is without knowledge or information sufficient to form a belief as to the truth of the other averments of paragraph VI of the complaint.

7. The intervener denies the allegations of paragraph VII of the complaint.

8. And further answering, the intervener says that the payment of $803.72 by the defendant, Carlton W. Spencer, as set forth in part in paragraph VI of the complaint, was made pursuant to an agreement between the plaintiff, the defendant, and the intervener, and that said payment was made with the full knowledge and approval of the plaintiff upon an agreement on the part of the intervener to pay said sum to the plaintiff if it should be determined as a matter of law that said payment should have been made to the plaintiff.

9. And further answering, the intervener says that for the years 1936, 1937, 1938 and 1939, which include the taxable period here in question, Somerville Sales & Service, Inc. was an employer subject to Mass. G. L. Ch. 151A, the Employment Security Law, which is a counterpart of the federal Social Security Act.

10. And further answering, the intervener says that the payment of $803.72 referred to in paragraph VI of the complaint and paid to the Commonwealth of Massachusetts by the defendant, Carlton W. Spencer, was in accordance with the provisions of the Social Security Act as amended, and Mass. G. L. Ch. 151A, the Employment Security Law. The said Social Security Act as amended and as now contained in U. S. C. A. Title 26, Internal Revenue Code, Chap. 9, Subchap. C, Sec. 1600, imposes a tax of 3 per cent on em-

ployers of eight or more individuals, and under the provisions of Sec. 1601 (a) (1), an employer who pays into a state unemployment compensation fund may receive credit therefor up to 90 per cent of the federal tax imposed upon the employer by Sec. 1600. Under Sec. 1601 (a) (3) the time for receiving credit against the federal tax was extended beyond the time provided in Sec. 1604 for the filing of the return required from the employer by the Commissioner of Internal Revenue.

11. An further answering, the intervener says that in the instant case the payment of $803.72 to the Commonwealth of Massachusetts on October 6, 1939 was paid in accordance with amendments to the Social Security Act for the year 1939, which extended the time in which an employer could make payment of his unemployment tax to the state and still receive credit against the tax due to the federal government. Sec. 902 (a) (1) of the Social Security Act Amendments of 1939 permitted this defendant, Carlton W. Spencer, to make payment to the state before the sixtieth day after the enactment of these Social Security Act Amendments and thereby receive credit for said payment against the federal tax.

12. And further answering, the intervener says that this payment to the state, and the federal credit applicable therefor, was regulated by an Act of Congress August 10, 1939 and which is contained in U. S. C. A. Title 42, The Public Health and Welfare, Chap. 7, Subchap. IX, Sec. 1102 under "Historical Note" which provides as follows:

> "Credits and Social Security Tax. Act August 10, 1939, c. 666, Title IX, sec. 902 (a) (b) (c) (d) and (h), 53 Stat. 1399, provided as follows:
>
> "'(a) Against the tax imposed by section 901 of the Social Security Act (section 1101 of Title 42) for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit for the amount of contributions, with respect to employment during such year, paid by him into an unemployment fund under a State Law —
>
> "'(1) Before the sixtieth day after the date of the enactment of this Act; * * *'."

The defendant in this complaint having paid to the Commonwealth of Massachusetts the sum of $803.72 on October 6, 1939, which was within the period provided by the amendment hereinafter referred to, said sixty-day period having expired on the ninth day of October 1939, has complied with both the federal and the state law, and this payment has been properly paid to the Commonwealth of Massachusetts under the Social Security Law as amended and has satisfied the debt due the plaintiff.

13. And further answering, the intervener says that additional clarifying amendments were enacted by Congress in 1941 and 1943 which enabled a taxpayer to obtain credit under the Social Security Act against the federal tax as originally provided under Sec. 901 of the Social Security Act, irrespective of the date of payment.

Wherefore, the intervener prays that the complaint be dismissed and the sum of $803.72 which was paid by the defendant, Carlton W. Spencer, to the Massachusetts Division of Employment Security, and which has been deposited in the unemployment trust fund in the United States Treasury to the credit of the Commonwealth of Massachusetts, be retained by the intervener in the unemployment compensation fund of the Commonwealth of Massachusetts.

JOSEPH J. LEONARD,
Designee of Attorney General,

JOHN A. BRENNAN,
Designee of Attorney General,
Attorneys for the Commonwealth of Massachusetts, Division of Employment Security, Intervener.

The cause was then continued from term to term to the March Term, 1946, when on April 3, 1946, the above cause came on for trial without jury upon stipulation and an agreed statement of facts the Honorable Charles E. Wyzanski, Jr., United States District Judge sitting, and after full hearing was taken under advisement.

During the same term on May 2, 1946, the parties filed an amendment to the agreed statement of facts and stipulation as per suggestion of the court at the time of the trial.

[MEMORANDUM: The amendment to the agreed statement of facts and stipulation referred to above being printed at page 21 of this record is here omitted.]

On the same day the court announced its opinion in which it ordered judgment for the defendant.

During the same term, on May 24, 1946, the following Judgment was entered:

JUDGMENT.

May 24, 1946.

WYZANSKI, J. In accordance with the opinion handed down in the above-entitled cause, it is ordered

Judgment for the plaintiff in the sum of six hundred and ten dollars and twenty-seven cents ($610.27) without interest and costs.

By the Court,

HELEN I. TWEEDY,
Deputy Clerk.

Entered: May 24, 1946.

CHARLES E. WYZANSKI, JR.,
United States District Judge.

From the foregoing judgment, on May 24, 1946, the defendant and intervener filed a notice of appeal to the United States Circuit Court of Appeals for the First Circuit. On the same day the defendant and intervener filed the required bond for costs on appeal, the Maryland Casualty Company acting as surety.

On August 19, 1946, the plaintiff filed a notice of appeal to the United States Circuit Court of Appeals for the First Circuit from the foregoing judgment.

OPINION.

May 2, 1946.

WYZANSKI, *D. J.*

This case, tried upon an agreed statement of facts, raises one important question: when an insolvent has assets insufficient to pay his obligations both under Title IX of the Social Security Act and under an approved state unemployment compensation act, how shall his assets be distributed? The case originally presented other questions, but they are easily solved in view of the recent ruling of the Supreme Court of the United States that in the distribution of insolvent estates the claim of the United States for taxes under Title VIII of the Social Security Act has priority over the claim of a state for contributions under a state unemployment compensation act. *People of the State of Illinois, ex rel. Gordon* v. *United States,* October Term 1945, No. 749, April 22, 1946.

In the case at bar these are the facts. February 3, 1939 Somerville Sales & Service, Inc., being insolvent in the bankruptcy sense, made a common law assignment for the benefit of creditors to Spencer. The United States Commissioner of Internal Revenue thereafter assessed against the corporation $963.08 on account of the assignor's 1938 taxes under Title IX of the Social Security Act, $690.05 on account of the assignor's 1938 and 1939 taxes under Title VIII of the Social Security Act and $21 on account of the assignor's 1939 United States capital stock taxes. October 6, 1939 Spencer paid on account of the Title VIII 1938 taxes $331.39. Spencer used the remaining assets to pay $803.72 to the Commonwealth of Massachusetts on account of obligations of his assignor under the Massachusetts Unemployment Compensation Act, Mass. G. L. (Ter. Ed.) c. 151A. Of this $803.72 $775.34 represented 1938 contributions and $28.38 represented 1939 contributions. The Commonwealth has agreed to pay over this $803.72 to the United States if the payment to the Commonwealth was in disregard of the priority of the United States under R. S. § 3466. The United States has agreed that if it prevails, judgment in this case shall be limited to $803.72.

My view at the time of the argument in court was that (although the United States had not abandoned or impaired its right under R. S. § 3466 to have absolute priority with respect to the claim for $21 plus interest on account of capital stock taxes and also the claim for $690.05 plus interest less $331.39 on account of Title VIII Social Security taxes) the United States could not object to having 90 per cent of its claim to $963.08 for 1938 taxes on account of Title IX of the Social Security Act reduced by the assignee's prior payment to the Commonwealth of amounts due for the year 1938 under the Massachusetts Unemployment Compensation Act. In short I thought that the United States could recover in this case its capital stock taxes, its Title VIII taxes, and 10 per cent of its Title IX taxes, but could not recover 90 per cent of its Title IX taxes. The first part of my tentative conclusion was later supported by the authoritative ruling of the Supreme Court already cited; the second part, in my view, has not yet been settled.

At the argument of this case I inclined to regard § 902 of the Social Security Act as giving taxpayers subject to Title IX a right to discharge (up to 90 per cent of the total amounts due) their obligations to the United States by seasonable payment to approved state unemployment compensation funds (provided, of course, that the taxes and contributions covered what Congress had treated as comparable periods of employment and that the state fund had been approved). It appeared to me as though in Section 902 of the Social Security Act the Congress of the United States had in effect said that a taxpayer under Title IX had with respect to 90 per cent of the taxes due under that title an option as to the government to which he made payment. It was as though the government had imposed an obligation to pay either the government or X, and the obligee chose to satisfy the obligation by paying X. [Compare Williston, *Contracts* (2d ed.) § 781.]

The question, nicely analyzed, seemed to me to be one not of priority but of alternative obligation.

The force of that analysis seemed to me the more persuasive when the true nature of Title IX of the Social Security Act as portrayed in *Charles C. Steward Machine Co.* v. *Davis*, 301 U.S. 548, was stressed. As to 90 per cent of the taxes under that title the

objective of Congress was not to collect federal revenues but to stimulate the creation of and payment to state unemployment compensation funds. It would defeat obvious Congressional intent to lay down a rule which required that this 90 per cent should go to satisfy a Title IX tax claim instead of going to the direct benefit of claimants under state unemployment compensation plans.

The correctness of the foregoing reasoning seemed to me to be proved by a suppositious case. Suppose A, an insolvent, with $200 in assets, owed $100 to the United States for 1938 Title IX taxes, $90 to Massachusetts for 1938 unemployment compensation contributions and $200 to general creditors. Can it be supposed that a court that was sensitive to the principle of marshaling assets would distribute the assets so that the United States received the first $100, Massachusetts the second $90, and the general creditors $10? To do that would give the two governments more than Congress contemplated and restrict the general creditors to 5 cents on the dollar. Would not a court that was mindful of the strict legal rights of the two governments, of the policies declared in their legislation and of the rights of the general creditors to be subject to no greater priorities than those governmental rights and policies require, distribute $10 to the United States, $90 to Massachusetts, and $100 or 50 cents on the dollar to the general creditors? This would allow the two governments to receive all that they claimed from the insolvent before his insolvency and would follow the rules of priority established by R. S. § 3466.

I do not find any reason to change my views in the light of the subsequent opinion delivered by the Supreme Court of the United States in *People of the State of Illinois ex rel. Gordon* v. *United States*, October Term 1945, No. 749, April 22, 1946. An examination of the original transcript of record in that case shows that the facts in that case were these. A trustee or assignee for the benefit of creditors had in his hands $1,010.81 (R. 18 par. 5). Against these there were asserted the following claims for taxes or obligations due from the assignor: United States capital stock taxes, $58.73 plus interest; United States Title VIII, Social Security Act taxes, $1,065.52 plus interest; United States Title IX

Social Security Act taxes, $1,065.52 plus interest; and Illinois unemployment compensation contributions $721.29 plus interest (R. 2). In short, the Title VIII taxes exceeded the available funds. The Supreme Court of Illinois in its opinion held that the United States was entitled to priority on account of the $1,065.52 plus interest which represented Title VIII Social Security Act taxes (R. 50-51). It, therefore, entered judgment giving the United States priority to the entire $1,010.81 (R. 34). The appropriate Illinois state official filed in the Supreme Court of the United States a petition for certiorari which quite correctly pointed out that the only issue as to which he sought review was whether Title VIII taxes were entitled to priority over Illinois unemployment compensation contributions, — the issue as to the priority of Title IX taxes being moot. (See petition for certiorari p. 11, note; compare, "questions presented", pp. 6-7. See also petitioner's reply to brief in opposition, p. 3.) Counsel for the United States mistakenly asserted that the Illinois court had given the United States priority with respect to Title IX taxes as well as to Title VIII taxes (Br. Opp. p. 4 lines 17-20) and urged that the question presented to the Supreme Court of the United States was "whether the claim of the United States . . . for unpaid capital stock taxes, insurance contribution [Title VIII] taxes, and unemployment compensation [Title IX] taxes, is entitled to prior payment . . . over state claims . . . for unpaid unemployment compensation contributions." (Br. 2)

In support of his contention the Illinois state official urged that state unemployment compensation claims were not subject to the priority of any federal tax claim whatsoever whether it be a capital stock tax claim or a Title VIII tax claim. His view was, as stated by Mr. Justice Black, that "Congress . . . intended in effect to amend Section 3466, by making its priority provisions inapplicable to state unemployment tax claims . . . the state here urges us to treat its claim 'tantamount to a claim of the United States.'" The Illinois official did not urge (and it would have raised merely a moot question to have urged) that the United

States' Title IX claim was subject to reduction by payment to a state fund.

Mr. Justice Black answered the precise contention presented by Illinois. He ruled that the priority accorded by Section 3466 to the general class of obligations due to the United States does not apply to obligations due to the Illinois unemployment compensation fund, and that therefore the Illinois claim does not defeat the priority of the United States under Section 3466.

Mr. Justice Black had no occasion to consider the problem whether as to 90 per cent of the amount due for Title IX taxes the United States had not given the taxpayer the option to make payment to Illinois instead of to the United States. That, as I have said, is a problem less of priorities than of the discharge of alternative obligations and of marshaling assets. In other words, Mr. Justice Black did not specifically consider whether a possible arrangement of claims ought not to be as follows: in a definitely preferred category the claim for capital stock taxes, the claim for Title VIII taxes, and the claim for 10 per cent of Title IX taxes; and in what I can best describe as a suspended category the claim for 90 per cent of Title IX taxes and the claim for state unemployment compensation contributions, — the taxpayer or his assignee or a court charged with administration of insolvent estates having the right to elect to pay the state and defeat 90 per cent of the United States Title IX claim; but if that election is not exercised the United States to have the customary Section 3466 priority for the 90 per cent as well as the 10 per cent of its Title IX tax claim. Such a solution would not operate to give a state compensation claim a priority "tantamount to a claim of the United States" [see paragraph 5 of Mr. Justice Black's opinion]; it would merely allow a taxpayer his statutory option or alternative to discharge 90 per cent of his obligation to pay a United States Title IX tax claim by instead making payment to an approved state unemployment compensation fund.

It seems to me, as it apparently seemed to the Supreme Court of Illinois [R. 54 par. 2, *People* v. *Chicago Waste and Textile Co.*, 391 Ill. 29, 62 N.E. (2d) 537, 544, last paragraph] that that solu-

tion is the correct one. This course is not precluded by *People of the State of Illinois ex rel. Gordon* v. *United States* since on a careful analysis the issue of that possible marshaling of assets (1) was not raised by the record before the Supreme Court of the United States in that case and (2) was not considered by Mr. Justice Black in his opinion in that case.

Ordered that the Commonwealth of Massachusetts shall pay out of the $803.72 received from Spencer [1] on account of capital stock taxes, $21 together with 6% interest from the due date to the date of judgment; [2] on account of Title VIII taxes, $690.05 less $331.39 together with [a] interest on $690.05 at 6% from the due date until October 6, 1939; and [b] interest at 6% from October 6, 1939 until the date of judgment upon an amount arrived at by adding $690.05 and the interest just provided in 2 [a] and by subtracting $331.39; and [3] on account of Title IX taxes, $96.31 with interest at 6% to the date of judgment. As stipulated, the judgment will not carry interest or costs.

CHARLES E. WYZANSKI, JR.,
United States District Judge.

AGREED STATEMENT OF FACTS AND STIPULATION.

The parties to the above-entitled action agree that in paragraphs 1 to VI, inclusive, below, is a true statement of all the material facts bearing upon the issues raised in this cause, and that the case may be submitted to the court thereon.

I. This is an action of a civil nature to establish the priority of a debt due the plaintiff for taxes and to enforce the personal liability of the defendant, Carlton W. Spencer, therefor, under the provisions of Section 3466 of the Revised Statutes (U.S.C. 1940 ed., Title 31, Section 191) and Section 3467, as amended by Section 518 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680 (U.S.C. 1940 ed., Title 31, Sec. 192). The action was commenced under the authority and sanction of the Commissioner of Internal

Revenue and under the direction of the Attorney General of the United States.

II. On February 3, 1939, Somerville Sales & Service, Inc., a Massachusetts corporation, and a debtor not having sufficient property to pay all its debt , made a voluntary common law assignment for the benefit of creditors to the defendant, Carlton W. Spencer, which he accepted on that date. The defendant, Carlton W. Spencer, resides within the District of Massachusetts, and this court has jurisdiction of the parties and of the subject matter.

III. The Commissioner of Internal Revenue duly and seasonably assessed against the above-named corporation taxes, penalties, and interest, as follows:

(1) Under the Social Security Act (Title IX) tax for the year 1938	$963.08
(2) Under the Social Security Act (Title VIII)	
(a) Taxes for the year 1938	669.39
(b) Taxes for the first quarter of the year 1939	20.66
(3) Capital stock tax for the year 1939	21.00
Total	$1,674.13

This amount was included in proofs of claim duly and seasonably filed by the Collector of Internal Revenue with the said defendant, as assignee. The sum of $331.39 was subsequently paid by the said defendant as hereinafter stated, and was credited by the plaintiff to item (2) (a) above, leaving balances still due, as follows;

(1) Under item (1) above	$963.08
(2) Under item (2) (a) above	338.00
Under item (2) (b) above	20.66
(3) Under item (3) above	21.00
Total	$1,342.74

together with interest according to law.

IV. The said defendant, as assignee, on or about February 3, 1939, came into possession of certain assets of said corporation which he converted into cash in the total amount, including cash acquired from the corporation, of $1,135.11.

V. The Commonwealth of Massachusetts duly and seasonably filed a claim with the said defendant, as assignee, for $803.72 for monies due in full from said corporation, Somerville Sales & Service, Inc. IV Annotated Laws of Massachusetts (Recompiled 1942) Chap. 151A.

VI. On October 6, 1939, the defendant, Carlton W. Spencer, as assignee, disbursed said cash as follows: $803.72 to the intervener, the same being the full amount of its claim, and the balance of $331.39 to the Collector of Internal Revenue, in partial satisfaction of the plaintiff's claim, leaving a balance claimed by the plaintiff in the amount of $1,342.74, with interest according to law.

VII. When the intervener accepted the said payment of $803.72 from the defendant, Carlton W. Spencer, it did so with the conviction that this constituted a payment under the Social Security Act of 1935; as amended by the Social Security Act Amendments of August 10, 1939.

VIII. It is stipulated by the parties hereto (a) that in the event the plaintiff is entitled to recover, the plaintiff abandons its claim to any sum beyond the $803.72 which represents the amount which the defendant Spencer transferred to the Commonwealth of Massachusetts; (b) that no costs or interest on the judgment shall be allowed to any party; and (c) that any such order of the court shall be appealable and nothing herein shall prejudice the right of any party hereto to appeal therefrom.

EDMUND J. BRANDON, *United States Attorney,*
by GEORGE F. GARRITY,
Assistant U. S. Attorney,

A. BARR COMSTOCK,
Special Assistant to the Attorney General,
Attorneys for the Plaintiff.

FRANK C. HESSION,
Attorney for the Defendant,
CARLTON W. SPENCER.

JOSEPH J. LEONARD,
Designee of Attorney General,
JOHN A. BRENNAN,
Designee of Attorney General,
Attorneys for the Commonwealth of Massachusetts, Division of Employment Security, Intervener.

AMENDMENT TO AGREED STATEMENT OF FACTS AND STIPULATION.

[Filed May 2, 1946.]

It is agreed by the parties to the above entitled action that the agreed statement of facts and stipulation which the parties have submitted to the court may be amended in Item V so that the said Item V will read as follows:

V. The Commonwealth of Massachusetts duly and seasonably filed a claim with the said defendant, as assignee, for $803.72 for taxes and interest due in full from said corporation, Somerville Sales & Service, Inc., — IV Annotated Laws of Massachusetts (Recompiled 1942) Chap. 151A (the Massachusetts Unemployment Compensation Law) — as follows:

(1) Tax for the year 1938	$775.34
(2) Tax for the year 1939	28.38
Total	$803.72

The balance of $331.39 in the possession of the defendant, as assignee, was paid to the Collector of Internal Revenue on October 6, 1939.

EDMUND J. BRANDON, *United States Attorney,*
by GEORGE F. GARRITY,
Assistant U. S. Attorney,
Attorneys for the Plaintiff.

FRANK C. HESSION,
Attorney for the Defendant,
CARLTON W. SPENCER.
JOSEPH J. LEONARD,
Designee of Attorney General,
JOHN A. BRENNAN,
Designee of Attorney General,
Attorneys for the Commonwealth of Massachusetts, Division of Employment Security, Intervener.

NOTICE OF APPEAL.

[Filed May 29, 1946.]

Notice is hereby given that Carlton W. Spencer, the defendant above named, and the Commonwealth of Massachusetts, Division of Employment Security, intervener, hereby jointly and severally appeal to the Circuit Court of Appeals for the First Circuit from the final judgment entered in this action on May 24, 1946.

CLARENCE A. BARNES,
Attorney General,
ALFRED E. LoPRESTI,
Assistant Attorney General,
Attorneys for CARLTON W. SPENCER, *Defendant, and* COMMONWEALTH OF MASSACHUSETTS, *Intervener.*

NOTICE OF APPEAL.

[Filed August 19, 1946.]

Now comes the plaintiff, the United States of America, by Edmund J. Brandon, United States Attorney for the District of Massachusetts, and serves notice that it appeals to the Circuit Court of Appeals for the First Circuit from the judgment for the plaintiff entered by this court on May 24, 1946.

EDMUND J. BRANDON,
United States Attorney,
by GEORGE F. GARRITY,
Assistant U. S. Attorney.

DESIGNATION OF CONTENTS OF RECORD.

[Filed July 3, 1946.]

Now come the defendant Carlton W. Spencer and the Commonwealth of Massachusetts, Division of Employment Security, intervener, and hereby designate the complete record and all the proceedings and evidence in the action to be contained in the record on appeal.

CLARENCE A. BARNES,
Attorney General.
ALFRED E. LoPRESTI,
Assistant Attorney General.

CERTIFICATE OF SERVICE.

I, Alfred E. LoPresti, assistant attorney general for the Commonwealth of Massachusetts, and attorney for the defendant Carlton W. Spencer, hereby certify that I have served copy of the foregoing designation of contents of record on appeal of the defendant and the Commonwealth, Division of Employment Security, upon Edmund J. Brandon, Esquire, United States Attorney, counsel of record for the plaintiff, by mailing a letter, postage prepaid, containing a copy of the above designation of contents of record on appeal to Edmund J. Brandon, Esquire, Federal Building, Boston, Massachusetts, on July 2, 1946.

ALFRED E. LoPRESTI,
Assistant Attorney General.

DESIGNATION OF CONTENTS OF RECORD.

[Filed September 19, 1946.]

Notice is hereby given pursuant to Rule 75 of the Federal Rules of Civil Procedure that the plaintiff-appellant herein designates the complete record and all the proceedings and evidence in the action to be contained in the record on appeal.

EDMUND J. BRANDON,
United States Attorney,
by GEORGE F. GARRITY,
Assistant U. S. Attorney.

CLERK'S CERTIFICATE.

I, James S. Allen, clerk of the District Court of the United States, for the District of Massachusetts, do hereby certify that the foregoing is the record on the appeals in the cause entitled:

No. 3671, CIVIL ACTION,

UNITED STATES OF AMERICA, Plaintiff,

v.

CARLTON W. SPENCER ET INTERVENER, Defendants,

in said District Court determined.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court at Boston, in said District, this thirtieth day of September, A.D., 1946.

[SEAL] JAMES S. ALLEN, *Clerk.*

[MEMORANDUM: Orders of enlargement of time for docketing cases to, and including, September 30, 1946, are here omitted.

A. I. CHARRON, *Clerk.*]

STATEMENT OF POINTS TO BE RELIED ON BY THE UNITED STATES ON ITS APPEAL.

[Filed in Circuit Court of Appeals October 2, 1946.]

The United States intends to rely on the following points on its appeal:

1. Taxes due the United States under Title IX of the Social Security Act are debts within the meaning of Section 3466 of the Revised Statutes and have priority, under that section, over unemployment taxes due a state.

2. This priority is clearly established, especially where the state has no specific and perfected lien.

3. Section 3466 should be construed liberally in favor of the United States in order to accomplish the purpose of the act, which is to secure adequate public revenue for Government requirements.

4. There is no provision in the Social Security Act or the Social Security Act Amendments of 1939 expressly amending, modifying, or making any exceptions to the broad and sweeping priority provisions of Section 3466.

5. There can be no such amendment, modification, or exception unless the intent of Congress to that effect is clearly evidenced, and no such evidence is found in any provision of either of these federal social security acts.

6. Neither of these federal acts evidences a Congressional purpose to exempt state employment taxes from the priority provisions of Section 3466, which are clearly applicable to such taxes.

7. Nothing in either of these federal acts indicates a Congressional purpose to treat a state unemployment tax as the equivalent of a federal tax, and the two are separate and distinct.

8. The underlying philosophy of the Social Security Act was to keep the state and federal systems separately administered.

9. Only the plainest inconsistency would warrant the finding of an implied exception to the operation of such a clear priority provision as that in Section 3466, or an amendment or modifica-

tion thereof, and no such inconsistency is evidenced by any subsequent act of Congress.

10. Section 3466 is not inconsistent with the express language, the implications, or the purposes of either of the federal social security acts.

11. Certain provisions of the Social Security Act indicate that Congress intended, so far as practicable, to apply to social security taxes all the remedies available to the Federal Government in collecting other taxes, and Section 3466 provides one of these remedies.

12. There is no provision, express or implied, in either of the social security acts, permitting a credit on a social security tax assessed against an insolvent corporation to be taken by an assignee for the benefit of the creditors of the corporation under a common law voluntary assignment, by reason of the payment by him of a state unemployment tax.

13. On the contrary, there is a clear implication in the Social Security Act Amendments of 1939 and the applicable Treasury Regulations that such a credit cannot be taken.

14. In the absence of an express statutory provision permitting a credit to be taken for payment by a fiduciary of a state unemployment tax, the fiduciary is obliged to pay to the Government the federal social security tax in full, and has no option to do otherwise. No such statutory provision can be found in the Social Security Amendments of 1939 or in any other Act of Congress, applying to an assignee.

15. The maximum credit allowed any fiduciary or taxpayer by the Social Security Act or the Social Security Act Amendments of 1939 is the amount of the payment on account of the state unemployment tax, this credit in no event to be greater than 90 per cent of the federal social security tax.

DOUGLAS W. McGREGOR,
Assistant Attorney General.

ANDREW D. SHARPE,
A. BARR COMSTOCK,
Special Assistants to the Attorney General.

EDMUND J. BRANDON,
United States Attorney.

GEORGE F. GARRITY,
Assistant United States Attorney.

STATEMENT OF POINTS TO BE RELIED UPON BY THE DEFENDANT, CARLTON W. SPENCER, AND THE INTERVENER, COMMONWEALTH OF MASSACHUSETTS, DIVISION OF EMPLOYMENT SECURITY.

[Filed in Circuit Court of Appeals October 4, 1946.]

1. That Section 902 of Title IX of the Social Security Act as amended gives the taxpayer the option of making payment to a State for taxes due under Section 901 of said Act and receiving 90 per cent credit therefor from the United States of America on his liability for federal excise tax imposed under Section 901 of said Act.

2. That the issue involved in this case is not one of priority, but rather one as to the right of the taxpayer to choose in the payment of one of several alternative obligations.

3. That Section 902 of the Social Security Act gives taxpayers subject to Title IX a right to discharge "up to 90 per cent of the total amounts due" for obligations to the United States of America by the seasonable payment (or within such time as authorized by amendment) to the approved State Unemployment Compensation Division.

4. That a taxpayer's liability to pay to the United States of America for federal taxes is a single responsibility even though it consists of various types of taxes.

5. That the 90 per cent credit permitted by such Section 902 of the Social Security Act is available to a taxpayer as against his liability to the United States of America for taxes of any kind.

6. That a common law assignee with reference to the payment of taxes imposed by Section 901 and with reference to the credit provision of Section 902 stands in the same position as the assignor.

7. That the amendments to the Social Security Act providing for a late payment of the tax due under Section 901 so that a taxpayer may receive credit provided for by Section 902 extend and apply to a common law assignee of an insolvent taxpayer.

8. The failure on the part of Congress to mention a common law assignee in the amendments to the Social Security Act providing for late payments for title IX taxes under Section 901 does not change or alter the common law of assignment and a common law assignee of an insolvent debtor may avail himself of the extension provided by such an amendment even though he is not specifically named in said amendments.

9. There is no priority in the order of payment for the various taxes that a taxpayer may be responsible for to the federal government.

10. That the provisions of the Social Security Act providing for payment to the State directly and for the receipt of 90 per cent credit therefor are not inconsistent with nor do they amend or repeal the provisions of Section 3466 of the United States Revised Statutes, but merely authorize the payment by the taxpayer to the State and for which a credit of 90 per cent is given.

11. Assuming that the provisions of the Social Security Act and its amendments are inconsistent with Section 3466 of the revised statutes, then to that extent Section 3466 is amended or modified thereby.

By their Attorneys,

CLARENCE A. BARNES (BY A.E.L.),
Attorney General.

ALFRED E. LoPRESTI,
Assistant Attorney General.

[fol. 29] PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On February 5, 1947, these cross-appeals came on to be heard and were fully heard by the court, Honorable Armistead M. Dobie (by assignment), Honorable John C. Mahoney and Honorable Peter Woodbury, Circuit Judges, sitting.

Thereafter, to wit, on April 2, 1947, the following opinion of the court was filed:

UNITED CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT
OCTOBER TERM, 1946

No. 4193

COMMONWEALTH OF MASSACHUSETTS et al., Appellants,

v.

UNITED STATES OF AMERICA, Plaintiff, Appellee

No. 4209

UNITED STATES OF AMERICA, Plaintiff, Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS et al., Appellees

Cross Appeals from the District Court of the United States for the District of Massachusetts

Before Dobie, Mahoney and Woodbury, JJ.

Alfred E. LoPresti, Assistant Attorney General, Massachusetts, with whom *Clarence A. Barnes*, Attorney General, Massachusetts, and *John A. Brennan*, Chief Counsel, Division of Employment Security, were on brief, for Commonwealth of Massachusetts, Intervenor, and Carlton W. Spencer, Defendant.

Norman S. Altman, Special Assistant to the Attorney General, with whom *Sewall Key*, Acting Assistant Attorney General, *Helen R. Carloss*, Special Assistant to the Attorney General, *George F. Garrity* and *Thomas P. O'Connor* were on brief, for United States of America.

[fol. 30] OPINION OF THE COURT—April 2, 1947

MAHONEY, J:

This case is here on cross appeals from the judgment of the district court. The question involves the application of Revised Statutes § 3466 (1898),[1] 31 U.S.C. § 191 (1940), to payment of competing claims of the United States and the Commonwealth of Massachusetts against an insolvent taxpayer for unemployment compensation taxes under Title IX of the Social Security Act of 1935, 49 Stat. 620, 639 (1935), 26 U.S.C. § 1600 *et seq.* (1940), and the Massachusetts Unemployment Act. There is no dispute as to the facts which are briefly as follows: The Somerville Sales & Service, Inc., being insolvent in 1939 made a common law assignment for the benefit of creditors. The Commissioner of Internal Revenue filed with the assigne a claim against the assignor for 1938 federal unemployment compensation taxes under Title IX of the Social Security Act in the sum of $963.08, for 1938 and 1939 federal insurance contributions taxes under Title VIII of said Act in the sum of $690.05, and for 1939 capital stock tax in the sum of $21.00. The Commonwealth of Massachusetts filed with the assignee its claim for state unemployment taxes under Massachusetts Unemployment Compensation Act in the sum of $803.72, representing contributions for 1938 and 1939. On October 6, 1939 the assignee paid out of the sum of $1,135.11 which he had realized from the sale of the assets of the assignor $803.72 in full payment of the claim of the Commonwealth [fol. 31] of Massachusetts and the remainder of $331.39 he paid to the Collector of Internal Revenue. This latter sum was credited to Title VIII taxes due for 1938 and

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[1] "Sec. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

there remained unpaid the sum of $1,342.74 with interest. Massachusetts has agreed to pay over the above mentioned $803.72 to the United States if the payment to it was in disregard of the priority of the United States under Rev. Stat. § 3466, and the United States has agreed that if it prevails the judgment shall be limited to $803.72.

The lower court held that the United States had priority as to its capital stock taxes, its Title VIII taxes, and 10 per cent of its Title IX taxes, but that it could not recover 90 per cent of its Title IX taxes, stating that the taxpayer or his assignee had the alternative right to pay the 90 per cent of his obligation under Title IX to an approved state unemployment fund. It cited *Illinois* ex rel *Gordon* v. *United States,* 328 U.S. 8 (1946) in support of its decision as to capital stock taxes and Title VIII taxes but said that the Supreme Court had no occasion in that case to consider the problem whether as to the 90 per cent of the amount due for Title IX taxes the statute had not given the taxpayer the option of making payment to a state instead of to the United States.

Since the lower court handed down its decision in the instant case, the Supreme Court in *Illinois* ex rel *Gordon* v. *Campbell* (decided December 23, 1946) restated its position as follows:

> "*Illinois* ex rel. *Gordon* v. *United States,* 328 U.S. 8 held that in circumstances which called into application Rev. Stat. § 3466, 31 U.S.C. § 191, the claims of the United States for federal insurance contributions taxes under Title 8 of the Social Security Act, 49 Stat. 620, 636, and for federal unemployment compensation taxes under Title 9 of the Social Security Act, 49 Stat., at 639, had priority over claims of Illinois [fol. 32] for taxes under its Unemployment Compensation Act. That decision is controlling, of course, upon the same feature of this case. . . ."

Under said § 3466 it is stated that where a debtor is insolvent the debts due the United States must be paid first. There is no question but what these are debts due the United States. "The words of §3466 are broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States." *United States* v. *Waddill, Holland & Flinn, Inc.,* 323 U.S. 353, 355 (1945). It has not been decided that taxes under Title IX of the

Social Security Act are an exception which can be read into this statute and we do not think that they are. Nor do we think that §902 amended by implication said §3466. Recently the Supreme Court in *United States Department of Agriculture* v. *Redmund*, decided March 17, 1947, has said: "We reiterate what was said in *United States* v. *Emory*, 314 U.S. 423, 433: 'Only the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of § 3466.' "

"We agree that the social security legislation provides a method for accomplishing state and federal unemployment relief systems, integrated in plan, function, and purpose, and that sound state systems are essential to complete success of the congressional plan. But we cannot agree that Congress thereby intended in effect to amend § 3466, by making its priority provisions inapplicable to state unemployment tax claims." *Illinois* ex rel, *Gordon* v. *United States, supra*, at p. 11. There is nothing here to show any intention on the part of Congress that only 10 per cent of the taxes under Title IX of the Social Security Act should be collected by the United States from insolvents. The words of the Act do not show such intention and the court has no power to apply what it may deem [fol. 33] equitable principles in the distribution of an estate when Congress has formulated the rule that must be applied. In re *White Plains Oil Corp.*, 287 N.Y. 141, 38 N.E. (2d) 472 (1941).

The taxpayer was clearly insolvent at the time it made the assignment for the benefit of creditors. The total amount of its assets was $1135.11 and apart from all other claims filed with the assignee the claim of the United States alone amounted to $1674.13. The claim for taxes under Title IX was $963.08. The payment of Title VIII taxes and capital stock taxes would leave a balance in the hands of the assignee of only $424.06. This was clearly insufficient to pay Title IX taxes and the full amount of those taxes had to be paid before any payment could be made to the Commonwealth of Massachusetts. Under § 902 of the Act the only way in which a taxpayer may obtain a credit against Title IX taxes would be to make actual payment to a state. In this case such a payment could not be made until the United States claim was paid. By paying the United States as required under § 3466 there would be

nothing left with which to pay Massachusetts. Hence there is no way by which a credit against Title IX taxes could be obtained.

The determination by the district court that the question was one of meeting alternative obligation was error. There was no such alternative obligation here. Section 3466 commanded the payment to the United States of debts due it and therefore there was no balance left to meet any state payment with which to obtain such credit.

The judgment of the District Court is affirmed as to Title VIII taxes and capital stock taxes and is reversed as to Title IX taxes, and the case is remanded to the District Court for judgment in conformity with this opinion.

[fol. 34] On the same day, to wit, April 2, 1947, the following Judgment was entered:

JUDGMENT—April 2, 1947

This cause came on to be heard February 5, 1947, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, April 2, 1947, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed as to Title VIII taxes and capital stock taxes and is reversed as to Title IX taxes, and the case is remanded to the District Court for judgment in conformity with the opinion passed down this day.

By the Court, (S.) Arthur I. Charron, Clerk.

Thereafter, to wit, on April 16, 1947, mandate was stayed until further order of court.

[fol. 35] CLERK'S CERTIFICATE

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing pages, numbered 1 to 34, inclusive, contain and

are a true copy of the record and all proceedings to, and including April 16, 1947, in the cross-appeals in said court numbered and entitled: No. 4193, Commonwealth of Massachusetts et al., Appellants, v. United States of America, Plaintiff, Appellee; No. 4209, United States of America, Plaintiff, Appellant, v. Commonwealth of Massachusetts et al., Appellees.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, Massachusetts, in said First Circuit, this sixteenth day of April, A. D. 1947.

Arthur I. Charron, Clerk. (Seal.)

[fol. 36] Supreme Court of the United States

Order Allowing Certiorari—Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.